N3LBKOOO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 22 Cr. 240 (AKH)

SUNG KOOK (BILL) HWANG, et al,

Defendants.

Oral Argument
----------x

New York, N.Y.
March 21, 2023
2:30 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: ANDREW M. THOMAS
MATTHEW D. PODOLSKY
Assistant United States Attorneys

GIBBONS, P.C.
Attorneys for Defendant Bill Hwang
BY: LAWRENCE LUSTBERG
THOMAS R. VALEN

FRIEDMAN KAPLAN SEILER ADELMAN & ROBBINS, LLP
Attorneys for Defendant Patrick Halligan
BY: MARY E. MULLIGAN
TIMOTHY M. HAGGERTY

(Case called; appearances noted)

THE COURT: Let's start with the motion to dismiss, and I guess you're going to be arguing, right, Mr. Lustberg?

MR. LUSTBERG: I'll be arguing. I'm not sure all the issues that your Honor is interested in, but I'll be arguing in regard to manipulation, *Rico*, and the government misconduct motions, so happy to do it. Mr. Valen will argue with regard to the securities fraud and mail fraud issues.

THE COURT: As you wish. Go ahead.

MR. LUSTBERG: Does the court wish them in any particular order?

THE COURT: You take it, Mr. Lustberg, and I'll interrupt you.

MR. LUSTBERG: Okay. Thank you, Judge. So, your Honor, today before this Court are significant substantive issues, which respectfully could really forever influence whether and how trading in securities can be prosecuted. And there are also significant procedural issues about how persons under investigation can and should be treated going to the obligations of federal prosecutors to be candid and fair.

THE COURT: Let's leave that for later. Let's do the substantive issue first.

MR. LUSTBERG: You got it. Thank you, your Honor. I'm going to start, your Honor, with the question of manipulation. The question of whether the government adequately

alleges securities fraud in terms of manipulation is a purely legal question, and that question is, Is it illegal, and can it be criminal to engage in real sales if the intent of doing so is to affect the price of securities. Assuming for purposes of this discussion that there is such intent, which of course we have to do for purposes of this motion practice.

First, under both Section 10(b) and Section 9(a)(2), the Supreme Court has made absolutely clear that manipulation -- to quote the Court, connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificial affecting the price of securities. That is, your Honor, it requires misleading practices, practices that -- again quoting, artificially affect the securities price in a deceptive matter. That is, that are aimed at deceiving investors as to how other market participants have valued a security. That is the standard.

And this occurs, your Honor, under the case law when a transaction sends a false pricing signal to the market. That's what the Second Circuit said in the *ATSI*, which I call *ATSI* case. Which in turn requires some deceptive conduct that results in the market receiving false information. That is, that the defendant conveyed some sort of false impression to the marketplace. At bottom as with all fraud, what is required is a misrepresentation, an act of deception -- in the words of the United States Supreme Court in the *Schreiber* case. In its

decision in *Mulheren*, the Second Circuit stated that it harbored doubt -- that its words -- as to whether it was sufficient for a manipulation conviction that the purchase was for the sole purpose of raising the price, rather than for investment purposes.

The Court didn't reach that question there because there was no proof that there had been, that that had been the sole purpose as to what occurred, and it pointed out that it was not enough that the defendant in that case, like the defendant here, engaged in high volume trading; but did so there in a way that concealed its trading.

THE COURT: The indictment alleges, among many other things, that the effect of the swaps was to avoid disclosure that would be required under Section 13(d) if more than 5 percent ownership of stock was obtained, was held. And it alleges that through the particular swaps and the effect of the swaps, particular to Mr. Hwang, that a great deal more control was exercised by Mr. Hwang and his company without telling anybody. So that the obtained positions that controlled a significant percentage of the float, someone who wanted to buy or sell would really want to know how much of a float there was because it has a lot to do with the liquidity of the stock and the free play of the market. Wouldn't you say that's an adequate allegation of manipulation?

MR. LUSTBERG: Respectfully, your Honor, no, it isn't,

and here's why. Just like many other of the allegations -- and your Honor has said there were a number of allegation in this indictment. The allegations regarding swaps go directly to what is and is not lawful. That is that there's no question, but that Mr. Hwang's swaps trading did not have to be disclosed in the way that it would if it were actual securities. That is, that's the effect of swaps, is that one does not have to make the disclosures -- and by the way in his case, there's the additional protection against disclosure that comes about because he's working from a family office, which you've kind of alluded to. But the truth is that his --

THE COURT: I don't think that makes a difference. We're not talking about the Investment Advisers Act. We're talking about manipulation.

MR. LUSTBERG: I understand. So the question you've asked is whether he concealed his -- he somehow concealed his investments in a way that deceived the market. Leaving aside that everyone --

THE COURT: That's what's alleged.

MR. LUSTBERG: That's what's alleged. He didn't because his actions in disclosing or non-disclosing were in precise conformity with the law. It's interesting. Your question is an interesting public policy question which as you've seen is being debated at the SEC and in Washington as to whether the statute should be changed to require a greater

disclosure in situations where swaps are involved.

THE COURT: It will not be the first time that an issue of fraud was also a subject of discussion whether or not to issue a policy position.

I recall a case decided by Judge Friendly, who I think very few people in this room will recognize -- but you and I will.

MS. MULLIGAN: Thank you, your Honor.

THE COURT: -- with accountants, accountants fraud where the accountants defense was that they did everything that was permissible, but where the effect of what they did and the intent of what they did was to have a material misrepresentation of the books and records, and that was considered a fraud.

And the question here is, Can acts that are legal in and of themselves get perverted in a way that carries out a scheme or artifice to defraud. And we could assume that if one exercises sufficient control over a stock to command the price, then there can be a manipulation. It may not be, doesn't have to be, but it can be.

MR. LUSTBERG: Your Honor, you've stated the question with precision.

THE COURT: Really. You're a good flatterer, Mr. Lustberg.

MR. LUSTBERG: Well, you know that that's not my way.

But an assignment case, which is what you're referring to --

THE COURT: Yes, right, an assignment.

MR. LUSTBERG: -- what Judge Friendly held there was not simply that it was -- that doing something completely legal could turn into something illegal if you had some sort of mal-intent. In that case, it was an accountant, and the accountant had certain disclosure obligations. He had to certify, and that was the crime there. Here's the thing about this case. This case is about trading. It's about huge amounts of trading that was ultimately very unsuccessful. And the question there is, Was that trading unlawful.

The government cites numerous cases for the proposition that if you add, quote, unquote, manipulative intent to the equation, then what was otherwise lawful suddenly can become unlawful. But what I'm really requesting that your Honor do very carefully is to look at each and everyone of those cases. Because each of those cases, your Honor, are cases in which there is classic securities fraud. There is deception on the market. There are false signals being sent to the market.

THE COURT: Isn't there an allegation of false signals and deception? The government may not be able to prove them, but they're alleged.

MR. LUSTBERG: They're not, your Honor. There really are not allegations of false statements of deception. What

there is, there's a number of allegations of fact that they say amount to fraud. But each and everyone of those, every single one of them is lawful conduct. So, for example, you yourself just mentioned a few moments ago, high volume trading, concentrated portfolios. Even if that's true, that is not unlawful. And it's very clear that it's not unlawful to trade in a big way, which is what Mr. Hwang did. They talk about the trades were timed.

THE COURT: What was the purpose of the trading? Why didn't he want to concentrate and buildup such large positions and create an illiquidity that may have prevented him from ever getting out? This is not in the indictment. I'm straying from the indictment, but it's my curiosity.

MR. LUSTBERG: Sure. You're asking a fact question, and here's what the facts would show. Mr. Hwang liked these stocks. He traded in a very limited portfolio of names that he studied well, and these particular names, these particular securities were securities for companies that he believed in. Not only did he believe in them, but he particularly believed like every other investor in the world that the best time to buy was when the number is low, is when the price is low. And so as the price fell, he did as he had done for years, he bought more.

But this goes to a proof question, and I think the government would say the same thing that what I'm saying now to

you is a proffer of what the evidence will show, but they have to show, they have to allege that there's actual fraud, that there's something that happened in the marketplace, the classic indicia of securities fraud that the case law talked about.

THE COURT: They're talking about a fraud of using the swaps as a way of building up the value of his position without letting the market know that he really controlled more than 5 percent. That's fraud.

MR. LUSTBERG: So, your Honor, first of all, there is a certain transparency in the marketplace because as the government alleges each -- not every single time, but when Mr. Hwang would buy sometimes, the counterparties would hedge and buy those shares. All of which was readily disclosed to the marketplace. But there's no allegation --

THE COURT: That's not so, is it?

MR. LUSTBERG: Pardon me.

THE COURT: How does the market know?

MR. LUSTBERG: Well, the market doesn't know it's Mr. Hwang doing the trading, but they know that what's being purchased in the market.

THE COURT: You can collect all that information, but not very easily.

MR. LUSTBERG: Well, none of it is gathered very easily, that's sort of not the point. But the question here is whether in buying swaps which -- and remember, a swap is --

your Honor knows what a swap is. You're essentially betting on a stock. That doesn't have to be disclosed. And so what you're saying is that -- what they're saying is that -- or if they are saying this, and I'm not sure this allegation appears anywhere in the indictment. In fact, I'm sure it doesn't appear anywhere in the indictment. That by purchasing swaps that he failed to disclose to the marketplace, he was obeying something the law. The law does not -- and by the way --

THE COURT: I concede to you that entering into a swap transaction is not forbidden by law.

MR. LUSTBERG: That's correct.

THE COURT: The issue whether is whether doing it in such a way as to amass a control position over the trading of a security for the purpose of inflating the value of its own security in an artificial way cannot be illegal, cannot be a fraud, cannot be a scheme or artifice to defraud. I take your position. I understand what you're saying. May I ask a few questions to Mr. Thomas.

MR. LUSTBERG: May I just respond to one thing that your Honor just said, just one thing quickly.

THE COURT: Sure.

MR. LUSTBERG: I want to emphasize a word that you just used when you summarized the allegation, and that summary included the idea that his position was artificial. That there was something artificial about the pricing.

THE COURT: That's alleged.

MR. LUSTBERG: That's what's alleged. Well, yes and no it's alleged. I mean the artificiality.

THE COURT: It's alleged that there was a false inflation to the value of the stock.

MR. LUSTBERG: Well, the allegation is that that was his intent. But artificiality requires a false statement to the marketplace. That false statement comes about in cases of spoofing or layering. It comes about in cases of wash sales. It comes about in specific situations where false information is injected into the marketplace.

THE COURT: You made that point somewhere earlier, and I made the government give you a letter which outlined and will give you more detail about the specific allegations and misrepresentations.

MR. LUSTBERG: No, your Honor. That letter was on something different. There's two sets of allegations in this case. One set of allegations has to do with whether there were false statements to the marketplace. The answer is, No, there weren't. These were sales that the marketplace had the same ability to understand as it would with regard to any other swaps; and then if there was hedging, any other subsequent transactions.

What you required the government to provide to us was a list of the misrepresentations that Archegos allegedly made

to the counterparties, to the banks. That's what you required the government to provide.

THE COURT: This is responding to your point that there was no misrepresentation involved regarding the swaps and the intent of the swaps.

MR. LUSTBERG: So, your Honor --

THE COURT: You make a good point here. There are two aspects of wrongdoing basically here. One is the conspiracy to violate *Rico*, and the other is a securities fraud.

MR. LUSTBERG: There are two different securities fraud violations that are alleged. One is manipulation, and the other is fraud in connection with communications between Archegos and the counterparties, the banks. Those are the two different types of fraud allegations that are at issue. I'm now only addressing the manipulation claim. And our argument, your Honor, is that mere intent to influence the price is insufficient to allege manipulation in a nutshell.

THE COURT: I think there's more than that, but let's see what Mr. Thomas has to say on this.

MR. THOMAS: Your Honor, Mr. Podolsky is eager to address this topic, so I'll turn it to him.

MR. PODOLSKY: Thank you, your Honor. Let me start just by responding to a comment that Mr. Lustberg made several times and led to the end of the colloquy that there must be false statements made in connection with a market manipulation

claim to proceed. I'm just going to quote now from the case law, because this is not an open question. And I'll start with *United States v. Royer*. This was Judge Rakoff sitting by designation on the Second Circuit, and considering a market manipulation claim. And what he pointed out was that in this context 10(b)(5) prohibits not only conventional frauds brought about by making materially false or misleading statements, but also so-called constructive frauds; that is, other forms of misconduct that have the same practical effect as a conventional fraud. So that's 2008 in the Second Circuit.

And this point has actually been addressed more recently by judges in this district, including Judge Cote in *SEC v. Lek Securities*. And among other things she pointed out that market manipulation can be accomplished through otherwise legal means. As the Second Circuit has noted, and she goes on to quote, *ATSI*, a Second Circuit decision; in some cases, scienter is the only factor that distinguishes legitimate trading from improper manipulation. And I'll point to one other decision. This is Judge Holwell's decision in *Masri* in 2007. And Judge Holwell also stated, market manipulation can also be accomplished through otherwise legal means, such as short sales and large or carefully timed purchases or sales of stock.

THE COURT: And that's what you allege?

MR. PODOLSKY: And that is exactly what we allege.

And these are decisions of this district and this Circuit stating clearly that the defendant's legal position is wrong, and their view of what is required to be alleged is incorrect.

THE COURT: I think, Mr. Lustberg, that's what I hold. I think that is what I hold. There is an adequate allegation in the indictment just to that effect, that the entering into the swaps along with the manipulative purpose that's alleged and the misstatements that are alleged carry out a fraud. It sufficiently alleges a conspiracy among the four to carry out this manipulation.

Now, I want to ask this of Mr. Thomas. What is the bright line, if any, between lawful trading in swaps, between lawful placement of trades. The timing of trades at the close or at the beginning of the market or after hours or before hours, permissible activities and a manipulative activity, such as you allege in the indictment? Is there a bright line?

MR. PODOLSKY: I think that's a great question, your Honor. I think the best way to answer it is to point to the elements that I expect the government will prove at trial which is, first, as relevant to your question, that the defendant engaged in practices that affected or controlled the price of the securities. So those are the techniques that your Honor was just adverting to.

And then second that the defendant did it knowingly and willfully and with the intent to affect or control those

prices. And so the government does --

THE COURT: Affect or control are different.

MR. PODOLSKY: That's right, your Honor. And I believe the case law provides either one would be sufficient. So in order to either control or increase or decrease the price of the security.

THE COURT: It can be argued that every single sale or purchase of a security can affect the price.

MR. PODOLSKY: That's right, your Honor. And that's why that intent, that knowing and willful and intent to manipulate are what distinguishes lawful from unlawful manipulation.

THE COURT: How do you define manipulation?

MR. PODOLSKY: Your Honor, just as I said, and I'm happy to pull up a citation here.

THE COURT: Tell me what you understand is manipulation.

MR. PODOLSKY: Yes, your Honor. It's any technique, in this case it's trading techniques that are carried out with the intent, as I said, to create an artificial price; that is to interfere with the natural interplay of supply and demand by controlling, increasing or decreasing the price of the security.

THE COURT: You agree with that definition, Mr. Lustberg?

MR. LUSTBERG: I really don't disagree with that definition, your Honor, except that there's more to. And if I might let me explain.

THE COURT: What more is there to it?

MR. LUSTBERG: The more to it has to be some fraudulent conduct. This is securities fraud. And, your Honor, I'm going to take --

THE COURT: I believe the Second Circuit has said that, Mr. Thomas. It must be some fraudulent activity, some deception. I think you allege it --

MR. PODOLSKY: We do extensively, your Honor.

THE COURT: -- to the things that were said and not said to the counterparties for one, and perhaps in other ways as well. But there does have to be some kind of fraudulent activity.

MR. PODOLSKY: That's right, your Honor. What we've alleged as we've stated, and I think your Honor adverted to this several times, is that by using swaps to carry this out, by timing the trades, by the size of the trades and so on, each of those were techniques that were used to deceive the market, to send a false pricing signal to the market.

THE COURT: Give me those incidents again.

MR. PODOLSKY: Sure. So, for example, your Honor, and I believe this is alleged throughout the indictment including at paragraph four, but your Honor referred to it. The use of

swap counterparties to disguise and deceive the market as to the extent of demand for these stocks. And at paragraph 35 of the indictment, the indictment alleges manipulative and deceptive trading techniques, such as purchasing or selling securities at particular strategic times of day, transacting in certain securities in large amounts or high volume.

THE COURT: Mr. Lustberg is going to answer, those are conventional activities.

MR. PODOLSKY: That's right, your Honor. And that's why I adverted to, for example, *Lek Securities*, Judge Cote's decision, Judge Holwell's decision in *Masri*, that when those activities, which as your Honor noted, can impact the price of a stock are carried out with the intention to impact the price of the stock, they become manipulative. As we've said in our briefing and as I read a few moments ago, that's what the case law in this circuit holds.

MR. LUSTBERG: Your Honor, I don't want to interrupt, if I may.

THE COURT: One moment. Every purchase, every sale can affect the market.

MR. PODOLSKY: That's correct, your Honor.

THE COURT: If it's a large purchase for sale, it can affect the market. No one would say it's illegal to engage in a large transaction. No one can say that it's illegal to enter into a swap transaction. But you're saying the combination of

these activities can be illegal?

MR. PODOLSKY: That's right, your Honor. As we note both in the indictment, as I think your Honor said a few moments ago, the way that these techniques were designed and used was intentionally deceptive and designed to manipulate the market. And as I pointed out, that's what the Second Circuit as well as Judge Cote, Judge Holwell have held to be sufficient to allege market manipulation.

THE COURT: Let me make this observation. At this point, given the different contentions of the parties, the difficulty in defining manipulation, the difficulty in drawing a bright line between activity that is lawful in itself and activities that taken together and with a malevolent purpose can be unlawful, that's a mistake for a district judge to dismiss the indictment.

The government may not prove its point. The government may not be able to prove its manipulation, but I think it needs to be done on a complete record; and then maybe I can decide or more likely a jury can decide whether there is or is not manipulation.

MR. LUSTBERG: We agree, your Honor.

THE COURT: Let's go over now the techniques of it. First allegation, a conspiracy to commit a *Rico* fraud. Mr. Lustberg points out that you never alleged a pattern. What is the pattern? Does it have to be alleged or is it sufficient

to say you conspired to commit a *Rico* fraud?

MR. THOMAS: Your Honor, I'll address this one if I could. The indictment contains all the allegations that are necessary to allege --

THE COURT: Where is the pattern?

MR. THOMAS: -- that there was an agreement to conduct the affairs of Archegos through a pattern of racketeering.

THE COURT: You sufficiently allege an agreement. Ms. Mulligan may disagree, but we'll have that later on.

MR. THOMAS: Yes, your Honor. I underscore this distinction --

THE COURT: Listen to me. I'm not commenting on an allegation of a conspiracy. I'm in agreement. I'm not at this point commenting on the existence of an enterprise. I'm asking you about a pattern of racketeering activity. Where in the indictment do I find that; and is it necessary to allege that?

MR. THOMAS: Your Honor, the answer to the second question is no. What needs to be alleged is that there was an agreement to conduct the affairs of the enterprise through a pattern of racketeering activity. The only charge under the racketeering statute that is contained in the indictment is a conspiracy charge. There is no substantive count. So all that need be alleged is that the participants, the conspirators in the scheme agreed to conduct the affairs through a pattern of racketeering activity.

THE COURT: So it's sufficient for an indictment to allege the comprehensive fact or comprehensive theory, but not the underlying facts?

MR. THOMAS: Yes, your Honor. Including --

THE COURT: It's not necessary for the indictment to allege the specific acts that constitute a pattern?

MR. THOMAS: Your Honor, the indictment does do that. The answer to the legal question that you're asking is, it is sufficient for the government to allege for an indictment to contain an allegation that there was an agreement to operate it through a pattern of racketeering activity, and to provide no further delineation of the pattern. As it happens here, the indictment does contain specific allegations about the pattern.

THE COURT: I concede the first part, but not the second part. Where is the second part?

MR. THOMAS: Your Honor, a couple of things. First of all, if you look, for example, in paragraph 68 which is printed page 48 as numbered of the indictment. Starting at the bottom of the page the indictment alleges that the conspirators agreed -- and I quote now, "To conduct and participate directly and indirectly in the conduct of the affairs of the Archegos enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, 1961(1) and 1961(5)."

THE COURT: I see subparagraphs A to C. They're not

very helpful. It maybe sufficient I guess, but they're not very helpful. They don't tell us anything.

MR. THOMAS: Your Honor, they're plainly sufficient under the Second Circuit's decision in *Applins* which said for conspiracy allegations of this sort where there are categories of criminal conduct that are at the object of the scheme, it is sufficient for the indictment to allege those categories. And those categories are themselves a pattern of racketeering activity if they are related to the enterprise. And those allegations too are found more specifically in the paragraphs that follow where it identifies in the indictment the purposes of the racketeering conspiracy.

THE COURT: Where is that?

MR. THOMAS: Starting at paragraph 70, and then continuing to paragraph 71, 72 and 73.

THE COURT: What pattern? I understand. Mr. Lustberg, would you agree with Mr. Thomas that subparagraphs A, B and C sufficiently allege for the purpose of an indictment the pattern?

MR. LUSTBERG: Absolutely not, your Honor. Let me start with his legal point. The agreement that they have to allege under the Second Circuit cases of *Cain* and *Satinwood* is they have to agree that the co-conspirators would further and endeavor, which if completed would satisfy all of the elements of a substantive *Rico* offense. That is, they want to say that

just because this is a conspiracy charge and not a substantive *Rico* charge that they don't have to adequately allege, as you've asked, a pattern, but that isn't correct.

THE COURT: That's their allegation.

MR. LUSTBERG: That's their argument.

THE COURT: And they accuse you of importing civil cases into the criminal law.

MR. LUSTBERG: Your Honor, their brief is replete with civil cases, both in the manipulation context and in the *Rico* context. It's not the least bit unusual to rely on civil cases.

THE COURT: We take the law where we find them, but I think Mr. Thomas is correct about the obligations of pleading.

MR. LUSTBERG: Except, your Honor, that the agreement -- so, for example, Judge, if you were to say, there was an agreement to violate -- to rob a bank, but there was no bank involved, then you haven't adequately alleged a conspiracy. Here, the agreement has to be to violate *Rico*; that is, through a pattern of racketeering activity. So it's perfectly appropriate -- and the case law does this -- looks to whether a pattern is alleged. And a pattern, as we've set forth, is not alleged here for two reasons:

Number one, there's not two predicate acts. There's one in. And the one is mail fraud, which as we know is their theory is under attack in the Supreme Court. But the second

one --

THE COURT: Offenses involving fraud in the sale of securities.

MR. LUSTBERG: Fraud in the sale of securities, and under *Rico* uniquely it has to be fraud in the sale of securities. But, your Honor, one looks not just to the conclusory allegations of the indictment, but look at all the allegations. And what these allegations are about has to do with Mr. Hwang's purchase of securities, not sales.

THE COURT: I think you're requiring too much of an indictment.

MR. LUSTBERG: Your Honor, I mean, it's not about requiring too much. An indictment is measured -- one looks at an indictment and says, Does this indictment allege a crime. If everything they say is true, does it amount to a crime? They do not in this indictment --

THE COURT: Let me ask Mr. Thomas, the allegation of offenses involving fraud in the sale of securities, and that's to "B" as well. Mr. Lustberg is arguing that if there's a fraud here, it's involved in the purchase of securities, not in the sale. And so these allegations contradict other allegations in the indictment.

MR. THOMAS: Your Honor, Mr. Lustberg is wrong on this point, both factually in terms of describing what's in the indictment. The paragraph 35 that Mr. Podolsky referred the

Court to talks about, for example, instances in which Archegos used sales itself as the seller in order to further its fraudulent scheme. And as the Court just observed in paragraph 68 --

THE COURT: Let me read 35. Just a minute.

(Pause)

THE COURT: Subparagraph B talks about purchases, as does C, as does D.

MR. THOMAS: Your Honor, I direct the Court to the introductory paragraph that says, "In particular Bill Hwang influenced the prices of stocks by utilizing manipulative and deceptive trading techniques, such as purchasing or selling securities at particular strategic times of day."

THE COURT: I skip that because it's the generality.

MR. THOMAS: Your Honor, the indictment need not contain more than a concise statement of the offense, and that paragraph doesn't stand alone. It stands next to the paragraph 68 allegations which assert literally that there was fraud in connection with the sale of securities. But Mr. Lustberg is also wrong as a matter of law that these allegations about the purchases are not themselves related to the sale of securities. Obviously for every security --

THE COURT: How so?

MR. THOMAS: Every security that Archegos purchased was sold to it by a deceived counter-party, so there's a sale

of securities involved in every transaction.

THE COURT: The sale gave more benefit to the sellers because of the manipulation of the price. In other words, the sellers sold into an inflated price, and therefore made more money.

MR. THOMAS: Your Honor, I'm referring to the counterparties who loss billions of dollars because of their reliance on Mr. Hwang's team's false statements.

THE COURT: Maybe because they built up their own long position.

MR. THOMAS: Well, as Mr. Lustberg referred to, the typical practice at the counterparties was to go into the market and buy one share of the stock. And so when Mr. Hwang wanted to take a particular bet, there would be a corresponding echo in the equities market by the counter-party.

THE COURT: The counterparties are hedging. It's a classic hedge. They have to sell back the security which is the swap at a certain time and at a certain price. And so they go into the market and buildup a long position. They hedge against that. The problem here is that the buyer of the counter-party, that is Archegos, didn't have the money to honor the trade; and so the price collapsed and the counter-party was left holding stock that didn't have the value it was supposed to have.

MR. THOMAS: Your Honor is absolutely correct in

assessing those dynamics. What I wanted to draw the Court to was first a factual point, which is that Archegos's involvement with the counterparties is an involvement in the counterparties selling swaps to Archegos, so sales are involved. And Justice O'Connor in a concurrence in the *Holmes* case observed that this language best be read to require there to be conduct sufficiently willful to constitute a crime and a sale of securities; not that the seller be the one or the sale itself be the thing that affected the fraud. That leads me to the second point --

THE COURT: The consequences of the fraud would be for selling the liquidation. It doesn't have to be part of the fraud, it could be the consequence of the fraud. Is that what you're saying?

MR. THOMAS: Your Honor, what we're saying is that the law only requires there to be a sale somewhere in the scheme, and here there are many sales, and judges in this Circuit have so found.

THE COURT: I'm sure Mr. Hwang did not consider sales as a part of his scheme.

MR. THOMAS: Your Honor, that also is factually inaccurate in the sense that the indictment alleges that Mr. Hwang took short positions in certain of the securities. And there's a table at the beginning of the indictment that identifies various tickers that Mr. Hwang manipulated through

his trading, and includes in it a list of two tickers that he manipulated on the short side.

THE COURT: I noticed that, but there are no allegations to make me understand what they were and how they did it. I know what they are. I saw the table, but I don't know how that was part of a manipulative scheme. There's no allegation regarding that.

MR. THOMAS: Respectfully, your Honor, we think that paragraph 35 and paragraphs 68 do provide all that's required under Rule 7 to describe there being a sale of securities in connection with the fraud. And further as I pointed out, judges in this Circuit, including Judge Cabranes when he was on the district court have held essentially that any willful violation of 10(b) is a *Rico* predicate. And so the suggestion that there needs to be some very specific type of sale conduct in the fact pattern is both wrong legally, but also ignores the instances in the indictment in which sales are described.

THE COURT: Something with all of this is that this case is different. I've never seen a swap case like this in the literature. Bottom line is that you've alleged a conspiracy. You've alleged the enterprise and you've sufficiently alleged a pattern of racketeering activity by the general allegations of the subparagraphs under paragraph 35. that's your position?

MR. THOMAS: Yes, your Honor. And in our briefing we

point --

THE COURT: And Mr. Lustberg points out that they don't make sense. It maybe it's true, Mr. Lustberg. But again, I think at this time on this record I cannot rule against the government in the sufficiency of the indictment.

MR. LUSTBERG: Your Honor, I understand the Court's ruling. I'm not quarreling with the Court, except that I sort of am.

THE COURT: Well, sure you are. That's what you're paid to do. You do it so well.

MR. LUSTBERG: Which is to say this: The government, as Mr. Thomas has and Mr. Podolsky have both talked about sufficiency of allegations and Rule 7 of the Federal Rules of Criminal Procedure. And in fact in their brief they talk about the fact that the elements of the crime is alleged in each case, and that we are on notice of the allegations against us. And when they talk about the notice, they talk about the extensive factual allegations in this indictment.

And what we're saying to your Honor right now is that those extensive allegations, to the extent that that is the basis for them arguing to the Court that we have sufficient notice should be taken seriously. And when one looks at this indictment, one is left with the firm conviction that that the fraud that's alleged here is that Mr. Hwang traded in order to keep the price up or get the price to go up. That is the

allegation of this indictment. And now suddenly they're saying that, well, even though the language of the statute, that is the *Rico* statute, requires a fraud in the sale of securities, that a set of allegations that go purely to purchases of securities is sufficient to allege the crime.

Congress could easily have said when it wrote *Rico* that it went to purchase of sale of securities, the same way as they said it under 10(b), but they didn't. They focused on the sale of securities. And the government wants to read that out of the statute today, and respectfully we don't think you should. I hear your Honor when you say that there's enough to get pass an indictment, that we should do this on a full record, that we should do it at a trial. But a trial here, Judge, with regard to this whole range of conduct, which is -- I thought Mr. Podolsky did a very good job of summarizing for your Honor what was in the indictment with regard to what they say shows fraudulent intent, the fraudulent intent that's required for a securities fraud violation. He said three things. He said that it's the use of swaps. It's timing, and it's the size of the trades. None of those things is remotely unlawful.

THE COURT: We've gone over that.

MR. LUSTBERG: I know you have, but I told you I was going to quarrel.

THE COURT: We've gone over that.

MR. LUSTBERG: Respectfully, Judge, I just think that we're going to have a trial here on a set of allegations that do not amount to a crime. And this is true in the *Rico* context, and it's true in the securities fraud context, and it's absolutely true in the manipulation context. Mr. Hwang's trades were just that, trades. There's no spoofing. There's no layering. There's no wash sales. There's none of the traditional indicia of fraud.

And all of the cases that Mr. Podolsky cited to the Court, *Lek Securities*, *Royer* and *Masri* all had indicia of fraud, all had the same indicia of fraud that the Court requires over and over. Respectfully, I think a careful reading of the case law that's cited leads inexorably to the conclusion that these allegations are insufficient. And we can wait and have your Honor decide that on a Rule 29 motion, but this is an apt time to decide it.

MS. MULLIGAN: I'm happy to wait until later in the conference --

THE COURT: I heard everybody else, Ms. Mulligan. Let me hear you.

MS. MULLIGAN: I'm hearing decisions and I'd like to weight in.

THE COURT: Go ahead.

MS. MULLIGAN: First of all with respect to the manipulative trading. The indictment alleges no role by my

client Mr. Halligan with respect to the manipulative trades in the indictment, and indeed he's not charged with the substantive count of manipulative trading.

Now with respect to this *Rico* conspiracy, your Honor, I think a decision that's directly on point is by your former colleague the late great Judge Patterson, and that is discussed in pages eight and nine of my reply brief which is *In re Par Pharma*. In that case Judge Patterson is very clear. This *Rico* statute, it requires more or every securities fraud would be swept in, and you know that's not the case. This is a very unusual securities *Rico*. It's not the type of *Rico* that the Southern District typically charges. We would in fact have a very different detailed allegations.

If this was a gangs *Rico* indictment, your Honor. We would have may to wit clause where we would know when the narcotic sales were, who they were sold to, and this is not that type of indictment. But with respect to this issue of the predicate act. As Judge Patterson said in that case, your Honor, it has to be in relation to the sale of the security. Congress meant that when they said it. They didn't hedge on this language, and that's the law, your Honor. And that's just not alleged here. And this *Rico* indictment it fails on numerous grounds.

THE COURT: What are we talking about Section 1348? What section of the criminal code?

MS. MULLIGAN: This is 1961(d), the *Rico* conspiracy, your Honor. And the predicate acts are defined in 1961, I believe it's (1)(D). Congress was very clear, your Honor, in delegating certain specific acts. In other parts of the law, it uses the term "purchase or sale of securities." In other specific parts of the criminal code it uses, "in connection with." And, your Honor, precision is particularly required in criminal cases where defendants have to have full and fair notice.

THE COURT: I'm looking for that part of 1961.

MR. HAGGERTY: Your Honor, the reference appears at 18, U.S.C., 1961, Section 1, Subsection D. It's a long somewhat rambling provision with multiple statutory references, fraud in the sale of securities provision appears --

THE COURT: Where?

MR. HAGGERTY: It appears maybe 7/8 of the way down.

THE COURT: After biological weapons?

MR. HAGGERTY: Yes, it is. In the copy I have six lines below biological weapons.

THE COURT: Fraud in the sale of securities.

MR. THOMAS: Your Honor, may I respond to Ms. Mulligan's point?

THE COURT: Yes.

MR. THOMAS: In our responsive briefing on this at page 20, we collect a number of authorities, including the

Judge Cabranes' decision that I mentioned before that interpret than phrase. They include, for example, a decision by Judge Nickerson that rejects this very argument that that language ought to be read in a cribbed and specific way, who held, "Any violation of 10(b) sufficiently willful to trigger the criminal penalties of Section 32(a) constitutes fraud in the sale of securities."

Then there's the Judge Cabranes decision that I mentioned, and other decisions that we collect too that essentially support the idea that fraud in the sale of securities is used in the *Rico* statute reaches a broader swath of conduct than what Ms. Mulligan or Mr. Lustberg would have the Court conclude here. And there is congressional reason to believe that reading is accurate because when the PSLRA was amended to strip from civil plaintiffs the ability to bring *Rico* claims alleging securities fraud, Congress stripped from them the right to bring any fraud actionable in the purchase or sale of securities. And the citation for that Congressional action is set forth in footnote three also on page 20. So the notion that Congress could have spoken on this topic is of course true and goes against --

THE COURT: The healing argument that this shorthand reference in Section 1961 left out the typical phrase, in connection with the purchase or sales. I understand that. We're in error of a strict interpretation of law. Let me ask

you a different question. What was the goal of Mr. Hwang allegedly, claimedly? What did he want to do at the end of the day?

MR. THOMAS: Your Honor, the indictment alleges that his goal was to run Archegos through a pattern of criminal conduct. But if you're asking me as someone familiar with the facts what he had in his mind beyond that?

THE COURT: Yes.

MR. THOMAS: I think Mr. Hwang wanted to control the markets, your Honor. I think he wanted to be an extraordinarily wealthy person, that he wanted to be successful beyond measure.

THE COURT: So it's a pump and dump scheme?

MR. THOMAS: I think it's a pump and brag scheme, your Honor.

THE COURT: Pump and brag?

MR. THOMAS: Mr. Hwang decided that if he affected the trades that we allege that he did, he could take over the majority of multiple major U.S. corporations freely trading stock. And as a result on paper claim absolutely unimaginable wealth, and that's precisely what he did until his scheme failed and it unraveled.

THE COURT: Is there any indication that he used it to inflate his balance sheet to get personal loans or somehow get distributions of money into his own pockets?

MR. THOMAS: Your Honor, the indictment describes multiple instances in which the very success of the fraud was recycled in the form of further statements to the counterparties to obtain yet additional trading capacity.

THE COURT: I understand that. I understand that allegation. What I'm trying to figure out in my mind to what end? A price can't stay artificially inflated. The bubble has to be pierced at some point in time. And when that happens, the position that Mr. Hwang built up would come to haunt him which is what happened here. He lost his money. If he were doing a certain amount of inflation to cover a larger amount of short selling, I could understand it. But I'm trying to figure out in my mind that I'm not succeeding, What was in it for him. What did he want. What did he want to achieve. Being a big shot, I suppose that's possible, but it doesn't seem to me that that was his aim. I can't figure out his aim.

MR. THOMAS: We certainly appreciate the Court's questions. I think there will be trial proof that would fill in some of that context as to what Mr. Hwang had in mind.

THE COURT: Like what? You want to give me a hint.

MR. THOMAS: Yes, your Honor. One immediate object was in order to achieve the kind of wealth and success that he desired, they had to convince all of these counterparties to give them sufficient trading quantity to make it happen. So for a period of the scheme, the intention is just that, to

achieve it's criminal object. Later on Mr. Hwang, we expect there'll be witnesses to say, will describe the sort of king of the universe type thinking that I was laying out for the Court, and that he had visions of grandeur to put it bluntly. And also there'll be evidence that Mr. Hwang did look for profitable offramps, ways to close out of these positions and lock in enormous gains; but that he was less successful at doing that than he was at driving up the stock price.

THE COURT: What are we not covering in the form of dismissal? I think we covered all the points? My ruling is the indictment is legally sufficient at this point in time, although it raises numerous questions in my mind.

MR. VALEN: Your Honor, if I may. I think the arguments so far have addressed Counts One through Nine, but not the counts that come after as to which we have different arguments.

THE COURT: Let me check that. Ten seems to be a repetition of one through nine.

MR. VALEN: I think, Judge, and as I read it, I welcome the government's clarification, Count One is *Rico*. Counts Two through Nine are securities fraud through market manipulation. But Count Ten is more traditional securities fraud through what alleges subsections A and C as well. The last line of paragraph 80 makes clear that it's securities fraud through false and misleading statements regarding

Archego's business portfolio and assets.

THE COURT: We've gone over that before. The misrepresentations that makeup part of a manipulation story. I take it out and in and of themselves make the subject of Count Ten. I rule, it's the same reasons I ruled before, legally sufficient. Wire fraud, again it's the same thing since the use of wires are involved, that's wire fraud, as well as securities fraud.

MR. VALEN: Judge, with respect to Count Ten, we have an argument regarding the Second Circuit's controlling precedent in the *Charles Schwab* case and the "In connection with" requirement that we briefed. If you have any questions about it, I'd be happy to address them, but I think Count Ten in particular is deficient in the regard.

THE COURT: Address it. Make sure I understand it.

MR. VALEN: Sure. Count Ten is charged under Section 10(b) and 10(b)(5) as the other fraud counts are. And the Supreme Court and Court of Appeals, and the government I think would not dispute that those claims require that the misrepresentations were made in connection with the purchaser sale of the security. That language is included in both Section 10(b) and in 10(b)(5), and it applies to claims under Subsections A, B and C of 10(b)(5). But the Court of Appeals for the Second Circuit in particular has addressed the requirement, the "In connection with" requirement in a bit more

detail. And most recently in a 2018 decision, which is described in our briefs, *Charles Schwab Corp v. Bank of America Corp*, the Court of Appeals has described the "in connection with" requirement as follows: A claim fails where the plaintiff does not allege that a defendant misled him concerning the value of the securities he sold or the consideration he received in return?

THE COURT: Or the what?

MR. VALEN: Or the consideration he received in return. Now I'm adding, for those securities, but I think that's implicit in the quote. And one thing when you focus on that language, it's important to recognize --

THE COURT: You think that's the language of limitation or a language of description?

MR. VALEN: I think it's a language if -- it works both ways. It's a language of description in the sense that the Court of Appeals is telling us what the subject matter of the misrepresentation has to be.

THE COURT: It describe that case. It doesn't describe all kinds of fraud. That doesn't work. Okay. We're finish with that.

MR. VALEN: Your Honor, we also have arguments with respect to Count 11, the wire fraud count. Although our argument is simply that there's a pending United States Supreme Court case that's been fully argued. And I check this morning,

the decision hasn't issued today, but it'll certainly issue on a Tuesday between now and the end of June that promises to impact that count. All we ask is that you give us leave to file a future motion depending on the outcome of that decision.

THE COURT: Mr. Valen, it makes no difference. When you go into the jury trial, this particular count doesn't matter. Everything that is put into Counts One through Nine is what matters. And the jury doesn't see this indictment, which answers another part of the problem. I don't give the indictment to the jury. It will be summarized and perhaps read verbatim, though I hesitate to do that because I don't think the jury will hear anything else. They'd be sleep by time you finish. It will be summarized and then you'll argue. And I don't think the arguments going to hang on wire fraud or not.

MR. VALEN: Thank you, Judge. With respect to what's done with the indictment, we do have a motion to strike references to some prior allegations.

THE COURT: Allegation four. Look, the question is, Can you use it before a jury. You can argue you can't. And the government said -- I don't know what the government is going to say. I'll decide that issue, whether it's in the indictment or not doesn't mean anything. It's public on public, so it doesn't matter. That motion is denied as academic.

MS. MULLIGAN: Your Honor, will your Honor be issuing

a decision or are today's rulings the decision of the Court?

THE COURT: Thanks, I was going to say something about that. My habit is to follow my oral rulings with a short summary decision. It will not be as long as Judge Rakoff's decisions, but it will be quite short and will hit the points. Until that time, I reserve the right to change my mind, but I thought it would be useful to you to give you my considered judgments at this point in time.

MS. MULLIGAN: Thank you, your Honor.

THE COURT: I have now heard your arguments, and I'll take them into consideration before I issue a written statement.

MS. MULLIGAN: Your Honor, I'd just like to raise a few additional points on behalf of Mr. Halligan.

THE COURT: Sure.

MS. MULLIGAN: As we mentioned in our brief with respect to the *Rico* count, your Honor. We believe the *Rico* count fails because it does not allege Mr. Halligan's agreement to engage in manipulative trading.

THE COURT: It says they all conspired, agreed and conspired.

MS. MULLIGAN: Right, your Honor. But they don't give us any specific details. And under *United States v. Benjamin* when these terms "conspire" are used, they need to descend into the particulars. And we're sitting here right now not knowing

what that is. Because as I opened with, and obviously there's no dispute, Mr. Halligan did not participate or have a role in the trades that are alleged in the indictment to be manipulative.

THE COURT: He was the chief financial officer, and it's alleged that he participated, and I suppose he participated by supporting the documentation of all the transactions. Each trade is reflected in some kind of a record. The indictment does not specify. It says they conspired and agreed, and that's sufficient.

MS. MULLIGAN: Thank you, your Honor. Obviously, I think more is required because every CFO in the United States would then be indicted if they're a company. But with respect to individual, your Honor, there needs to be some showing of the agreement, and that's just not here. But, your Honor, we await your decision, and we rely on all of the arguments in the opening brief and in our reply brief. Thank you very much.

THE COURT: Any matter of controversy given the rules of pleading that exist in a criminal case, there's a danger you talked about. It sweeps in criminal conduct and permissible conduct. I can't cure that now. What's left, the bill of particulars.

MR. THOMAS: Particulars and the defense misconduct motion, your Honor.

THE COURT: Let's do the bill of particulars. The

first aspect of this is the government should identify all alleged misrepresentations, requests themselves as for every and all. That's denied because it seeks evidence. A bill of particulars is there just to give notice. The government has done that in the indictment and by the supplemental letter of August 18, 2022, and that's sufficient.

The government should identify uncharged co-conspirators and others. That's an allegation in every conspiracy case I've seen, and I think the cases are legion that the unindicted co-conspirator did not have to be alleged. Having said that, it may be something that I want the government to be more specific about when we approach trial.

MR. THOMAS: Yes, your Honor.

THE COURT: And "C" is the government should identify all acts and transactions alleged to comprise the purported schemes. I think there is sufficient allegation to give notice on that, and that is denied as well. "D", the government should identify allegedly defrauded victims. That's not part of the case. You don't have to -- withdrawn. One defrauded victim is the counterparties. All the counterparties have been allegedly defrauded. Anyone who lost money having a hedged position and being able to liquidate the collateral that was put up by the conspirators is a defrauded victim. I don't think you need anything more specific than that. "E" the government should identify the date of the alleged Archegos

enterprise was formed and the alleged scheme to defraud began. The government gave a span of a year of 2020 to what, Mr. Thomas?

MR. THOMAS: Your Honor, let me read for you exactly what's alleged. In or about 2020, up to March 2021.

THE COURT: That's sufficient for the dates. "F" the government should identify all instances in which defendants are alleged to have aid and abetted supposed misrepresentations to counterparties. The instances do not all have to be alleged in the indictment. There is sufficient notice to allow the defendants to form a defense. I deny all these aspects of the motion for bill of particulars.

The next is the *Brady* obligation. This is a claim about the inadequacy in the *Brady* obligations is based on a supposed on a part of the prosecutor to search the investigative files of the SEC and of the Commodities Futures Trade Commission, the CFTC, to see if there's anything that would be of a *Brady* type of document and to produce it. There's no indication that these were joint investigations. The fact that representatives of the SEC and the CFTC may have been present at the interviews of various witnesses, particularly of the proffer given by Mr. Hwang doesn't show any joint investigation. The SEC and the CFTC have not played a part in this criminal prosecution. They have not appeared before the grand jury. They have not appeared in any of the

pretrial proceedings here, and there is no connection for the -- if the prosecutor were required to search the immense files that can be built up by the SEC and the CFTC, it would be an impossible obligation. The motion is denied.

MS. MULLIGAN: Your Honor, if I just may. I think this *Brady* issue is particularly significant to defense counsel, and I would like to make a record on this because when we were in court at our clients' arraignment on April 27, I was very happy to hear the magistrate put an order on the record advising the government of what their *Brady* obligations were.

THE COURT: Yes, it's an order in every case.

MS. MULLIGAN: And that order, your Honor, is in my hand and I'm happy to hand it up to the Court.

THE COURT: Yes, it's in every case, Ms. Mulligan.

MS. MULLIGAN: But the order clearly says, your Honor, that for purposes of this order, the government has an affirmative obligation to seek all information subject to disclosure under this order from all current or former federal, state, sand local prosecutors, law enforcement officers and other offices who have participated in the prosecution or investigation that led to the prosecution of the offenses with which the defendant has charged.

Reading this order, your Honor, which is very clear -- and again, the term "or" is used, and we all know as lawyers what that means. The investigation is included. Reading this

order in light of *United States v. Gupta*, your Honor, they're under an obligation to search the records and the notes from the interviews were the SEC and CFTC was present. That is not a burden. That helps the integrity of the entire system, your Honor.

THE COURT: The cases are to the contrary, and there is no joint or association in the investigation. The SEC was present at whatever interviews there were, some of them anyhow for the purposes of its own investigation and not to help the prosecution. Motion's denied.

The last motion I think is the motion of prosecutorial misconduct, and I I'll hear you, Mr. Lustberg.

MR. LUSTBERG: Thank you, your Honor. I want to start by talking about the limited relief that we're seeking with regard to this motion right now, and that is the relief we're seeking is a hearing. I hope that was very clear from our reply brief. Let's be clear what the concern is here. I've been a defense attorney for almost 40 years, and maybe that means I should have been wearier of the government's conduct here. But to the contrary I, like the Court and indeed like our entire system of justice, depend upon prosecutors given the tremendous power that they wheeled to do the right thing, to turn square corners, to seek justice, to be candid.

This is embodied in doctrines like *Brady*, and in many places in the criminal law where prosecutors are required to

tell the truth. We argue in our motion that that did not occur in two ways. First, the government told us -- and this is undisputed -- that our client was a subject of the investigation. They never corrected that record to tell us when he became a target. I don't know when he became a target, but I can tell you -- and I don't think that they disagree that they never used the words "Now he's a target." They say that they point to places where they say he was a concern. They talked about how they wanted to get his passport. There's other facts, but they never told us that. And that's okay. They don't have to tell us that.

But when they're continuing at the same time to interact with us, to ask us specific questions, to request that we make presentations on particular subjects, then it's a different thing.

And that leads to the second concern that we have. The second concern that we have -- and I've never seen this before ever is that we continued to interact with them in good faith. We continued to make presentations. We produced our client for interviews, and we did that because they purported to have an open mind. There's a lot of evidence, your Honor, that they didn't have an open mind. And we've tried to muster that proof for the Court so you can see that this is a colorable claim. But, I will admit that we don't know the point at which their mind was closed. I can tell you that on

the last day -- I'll wait till they finish consulting.

That on the last day when we went in and made a presentation specifically directed to answering questions that they posed as to Mr. Hwang's intent, a particularly important and difficult piece of factual information for them to gather, that within hours -- and we don't know exactly when, but within hours of the conclusion of that meeting Mr. Hwang was indicted.

Look, if they had told me he was a target, that would have been good information for me to have and I might have behaved differently. But I can tell you that if they told us that he was going to be indicted that afternoon, we would not have provided all the information that we did. Now their argument is, we didn't know until then. But, your Honor, I think that that is a disputed fact. And what I'm asking the Court to do is to hold an evidentiary hearing where we can explore that, where we can find out when they made that decision. There are indicia that it was made before.

We know, for example -- and maybe they didn't do this, but under the department of justice's manual in order to bring *Rico* charges, they had to get permission from Washington. We know that they booked grand jury time for that day. I don't know whether they knew at that time that they were going to indict him. But if they knew that, just a matter of common decency, of candor, of honesty would have encouraged them to tell us where they were.

What happened here, your Honor, was implicit, was an implicit false statement by the government, and many ways explicit. Because at the conclusion of that meeting on the day that Mr. Hwang got indicted, the government raised a question with us. It had to do with the issue that Mr. Valen raised a little while ago about the 2013 investigation of Mr. Hwang. And we said, we'll get you more information on it. And we communicated with them as we were walking out the door, and we communicated that with them on the next day.

And what occurred was that by that next day, we didn't know this because it was sealed and Mr. Hwang was arrested the next day, they had already indicted him. Your Honor, it's just not turning square corners. It's just not candid. However, maybe I'm wrong. Maybe the truth of the matter is that this Court after listening to this will conclude that notwithstanding all that, that they had an open mind an hour before they indicted our client. Maybe that's what the Court will conclude. But I think the Court in order to decide this very serious issue, and I can tell you I really hesitate to bring these sorts of allegations. We had extremely professional ongoing communication with the government throughout this process. It was something that I was proud of. I was proud of the presentations we made. I was proud that we made our client available or speak to them, all of which turned on my clear understanding that they were listening. That they

were considering our arguments.

I think the record would show that they weren't, and that what they were doing was deceiving us. And we would like -- we respectfully request that the Court -- and it can do this in-camera. It can do this in open court. It can do this under seal if there's confidential information, gather the appropriate facts so that it can make that determination, because this is not how a system of justice, your Honor is suppose to work.

Our assistant U.S. Attorneys and U.S. Attorneys in this country have particular obligations to be truthful. And I'm disappointed to say, I don't think that was the case here, but I could be wrong. And if I'm wrong, the Court should hold -- the Court should hold a hearing to decide whether I'm wrong. I can't imagine that the government would oppose the opportunity to set forth why the facts are not what they seem to be, which is that their minds were made up even as they were eliciting information. But I think that the Court should in an exercise of its obligation to make sure that our system of justice is fair should require that type of showing in much more detail than has occurred here.

What's occurred so far here is very vague, conclusory affidavits that don't address the facts that we say circumstantially show that they made up their mind even as they elicited information from us. Let me say just two other things

quickly. Your Honor, our position is not that the government ever has to tell our client whether he's a witness, subject or target. I have many cases where prosecutors refuse to give me that information. Most times they do, but they're cases where they don't. But what I'm saying is that when they tell us something, that it has to be true. The representatives of our government who are trying to put my clients in jail have to tell us the truth. That's what this application respectfully is all about. And truth can be not told in two different ways. There can be affirmative lies, or there can be failures to correct known misimpressions.

THE COURT: Before you had the first proffer, who suggested the idea of a proffer?

MR. LUSTBERG: We did. I'll take responsibility for that. I'm not sure whether that's true, but I'll say that for purposes of this record, we wanted to open up a dialogue with them. And that dialogue --

THE COURT: That's not uncommon.

MR. LUSTBERG: No. Let me tell you, this was extensive, your Honor. We made a presentation to them.

THE COURT: If Mr. Hwang was not going to be the subject or object of prosecution or investigation, who was?

MR. LUSTBERG: Well, so just for example --

THE COURT: Here's a heavy investigation by the prosecutor of Mr. Hwang's company. So it's either a company or

Mr. Hwang who's going to be the defendant if a case is brought.

MR. LUSTBERG: Your Honor, just so you're aware, there are two co-defendants here who have pled guilty. With respect to at least one of them, the allegations have to do with statements that were made to the counterparties. There is a disputed fact in this case as to whether Mr. Hwang had anything to do with those statements. Our position -- and we think the record will show at a trial, and what we argued to the government -- was that he had nothing whatsoever to do with those statements. Those were made by Mr. Becker.

THE COURT: It's not uncommon in complicated cases like this, particularly in SEC type cases to have submissions made and beyond in order to dissuade the government from bringing a prosecution.

MR. LUSTBERG: 100 percent that's correct.

THE COURT: Let me hear from Mr. Thomas.

MR. LUSTBERG: Let me just say one last thing which is, I also don't think that the government has an obligation to tell us our client is being indicted --

THE COURT: You made the point. Once they say, it's got to be true.

MR. LUSTBERG: But if they're not going to tell, then it's not just that. They're doing that while they're continuing a dialogue that results in our providing information to them.

THE COURT: I heard you. Mr. Thomas.

MR. THOMAS: Thank you, your Honor. The most outrageous thing about this circumstance is the defense motion itself. Throughout --

THE COURT: Let's not worry about outrageous. Just respond to the point.

MR. THOMAS: The first and absolutely determinative point is the Supreme Court's decision in the *Bank of Nova Scotia* case which makes it clear that accusations of misconduct cannot be the basis for the dismissal of an indictment, unless the misconduct supposedly goes to the impairment of the grand jury process itself. And I'm surprised to hear Mr. Lustberg say that the relief they want is merely a hearing, because as the Court will observe from the cover page of its motion, the defense moved to dismiss the indictment, which is not relief that this Court can lawfully provide.

Mr. Lustberg in the reply concedes that at no point did the government impair the grand jury process which basically ends the claim. And they further concede --

THE COURT: Can I feasibly have a hearing in this case?

MR. THOMAS: Not on this issue, your Honor.

THE COURT: Everything that would be subject of inquiry would be privileged.

MR. THOMAS: Your Honor, that's absolutely true. But

it's also true that there's nothing that the outcome of a hearing would do that would entitle Mr. Lustberg to relief under the law.

THE COURT: Mr. Lustberg knows very well how to protect his client if he wants that protection. I think it's the calculation of the benefits and the burdens of going in and talking with a prosecutor. And whatever the prosecutor says in that regard is always subject to a change of mind or a change of view. Since we're dealing with issues of intent, there's a possibility of persuasiveness up to the last minute. Motion is denied. All right. Where do we go from here?

MR. THOMAS: Your Honor, we're scheduled for trial now at beginning of January 2024, and the parties have been conferring about a potential agreeable pretrial schedule for the filing of various notices and pretrial motions. If we can hash that out, we'll submit a proposal to the Court.

THE COURT: Are you going to be using experts?

MR. THOMAS: We expect that we will, and the schedule that we're discussing would contemplate deadlines by which each side would file expert reports and submit any associated briefing.

THE COURT: Where are you in your discussions?

MR. LUSTBERG: I can answer that. The government made a proposal with regard to certain dates working backwards from the trial date. We accepted parts of that, and we ask them to

reconsider other parts. I believe we had a meet and confer, counsel can correct me if I have the timing wrong, a few weeks ago, and we have not heard back on their response to our proposed changes to the schedule. We're happy to continue to meet and confer and come up with a schedule if we can. And if we can't agree, we'll bring those to the Court.

THE COURT: Have I set a final pretrial conference date?

MR. THOMAS: I believe that you have. You did for the first trial date. Let me just look at the docket to see if you did.

THE COURT: Cause I can see this as a process.

MR. THOMAS: Yes, and the proposal advanced by the government would have expert disclosures due more than two months in advance of trial, and the defense has proposed even earlier than that. All parties agree that we want to give the Court time to deal with the expert issue among the other issues well in advance of trial.

THE COURT: We have a *Daubert* hearing here or a *Daubert* motion.

MR. LUSTBERG: Yes, your Honor.

THE COURT: This is a complicated case, folks. It's a complicated case. I believe in disclosure. There should be an absence of surprise at trial. It's going to be a difficult enough trial to deal with not to be burdened by side issues

that could have been ventilated beforehand. My rulings will be bias in favor of disclosure. You should know that.

MR. THOMAS: Yes, your Honor.

THE COURT: And early rulings as well. Both of you have a lot of technical difficulties to deal with. The government in terms of ordering its proof and keeping the attention of a jury in a long and complicated case. And the defense in just knowing what's the best thing to do with their clients, and they need time. Both sides need time to work this out. And perhaps two final pretrial conference dates. One early to rule on motions *in limine* and *Daubert* and that sort of thing, and the next one is necessary to be a bar date for the production of all -- the word escapes me. Not *Brady*.

MR. THOMAS: 3500 and *Giglio* material.

THE COURT: Not particularly witness material. What's the Supreme Court case?

MR. LUSTBERG: Maybe *Jencks* or *Giglio*.

THE COURT: *Giglio* material. I'll be at your disposal. Let me block it out as early as I can.

MR. THOMAS: Thank you, your Honor. I think we probably all collectively share your aims.

THE COURT: Final pretrial conference date is January 3. We should keep it close to trial, see if there's any lingering problems, but we need a date in December to argue everything out.

MR. THOMAS: Yes, your Honor. We'll confer with the defense and propose a schedule including a date for motion conference.

THE COURT: And call Bridgette and work it out.

MR. THOMAS: Yes, your Honor.

THE COURT: Is there anything else I can do today?

MR. THOMAS: Not from the government, your Honor.

THE COURT: Mr. Lustberg?

MR. LUSTBERG: No, your Honor.

THE COURT: Ms. Mulligan?

MS. MULLIGAN: No, your Honor. Thank you.

THE COURT: Thank you all.

(Adjourned)